88-803

No. 88-_____

Supreme Court, U.S.
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NOV 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary,
United States Department
of Health and Human Services, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT and APPENDIX

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Attorney of Record for
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November 15, 1988

QUESTIONS PRESENTED

1. Does invocation of mandamus jurisdiction, 28 U.S.C., section 1361 (1982), to enforce rights guaranteed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e, et seq., preclude, ipso facto, Title VII prevailing party status to the complainant?

2. Did the Court of Appeals err in denying that the petitioner prevailed on the merits of his substantive claim under Title VII of the Civil Rights Act of 1964, where:

(i) the agency had expressly adopted the EEOC's finding of illegal discrimination;

(ii) the agency had instituted remedial relief; and

(iii) the District Court subsequently precluded the reopening, reinvestigation, and a new determination of the issue?

CERTIFICATE OF COUNSEL REQUIRED BY RULE 21(b) OF THE GENERAL RULES OF THE UNITED STATES SUPREME COURT

The undersigned counsel of record for the petitioner certifies that the following listed parties appeared upon the pleadings below:

I. As plaintiff (petitioner) herein:

Grant Anthony

II. As defendants (respondents) herein.

Otis R. Bowen, */ Secretary of the United States Department of Health and Human Services; and

The United States of America.

/s/
Glenn H. Carlson, Esquire
Attorney of Record for Petitioner

*/ Pursuant to Federal Rule of Civil Procedure 25(d)(1), Mr. Bowen was substituted for Margaret M. Heckler by the District Court. See 674 F. Supp. 876.

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No. 88-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health and Human Services, et al.,

Respondents.

INTRODUCTION

Grant Anthony hereby petitions this Court for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, entered on June 7, 1988, is reported at 848 F.2d 1278 (D.C. Cir. 1988) and appears in the Appendix ("A") at 5a. Mr. Anthony's petition for rehearing and motion for clarification were denied by order dated August 17, 1988, as was also his suggestion for rehearing en banc; these, too, appear in the Appendix, at 3a and 1a, repectively. The opinion and order of the District Court, dated July 29, 1987, were unreported; these are printed in the Appendix hereto at 24a.

JURISDICTION

Jurisdiction over this petition obtains under Rule 20.2 of the Rules of this Court. Jurisdiction of the District Court was claimed under both Title VII of the Civil Rights Act of 1964 (42 U.S.C., sections 2000-e, et seq.) and The

Mandamus Act (28 U.S.C., section 1361), although only the latter was found by both the District Court and the Court of Appeals to be the proper jurisdictional vessel in the circumstances.

STATUTES AND REGULATIONS INVOLVED

Petitioner's substantive claims arose under Title VII of the Civil Rights Act of 1964 (42 U.S.C., sections 2000e, et seq.). In the District Court and in the Court of Appeals he successfully obtained enforcement of Title VII under The Mandamus Act (28 U.S.C., section 1361), but was told by the Court of Appeals that he could only, if at all, obtain his attorney's fees in accord with the provisions of the Equal Access to Justice Act (28 U.S.C., section 2412). The relevant text of these attorneys' fees provisions is set forth in the Appendix at 32a and 33a.

STATEMENT OF THE CASE

The history of this case is detailed in the opinion of the Court of Appeals, A at 6a - 13a. Suffice it to say that the agency, the Department of Health and Human Services, wrongfully denied to petitioner his right to have certain claims of illegal discrimination duly investigated ("The STRIDE claims"), while simultaneously it attempted to reopen for investigation a claim of illegal discrimination upon which the Equal Employment Opportunity Commission ("EEOC") had found "reasonable cause" to believe that discrimination had occurred ("the special leave procedure issue"). On this latter claim, the agency had instituted remedial action to cure the violation, and had done so long before its attempt to reopen the matter. The agency also expressly adopted in toto the recommended disposition of the case

issued by the EEOC, even though earlier, by operation of law, that recommendation had become the agency's own after the lapse of a thirty day period.

In the District Court, the agency was told it could not reopen the special leave procedure issue. Anthony v. Bowen 674 F. Supp. 876, 880 (D.D.C. 1986). In an unpublished opinion, the Court of Appeals directed the agency to investigate all of the STRIDE allegations. Anthony v. Bowen, No. 86-5473 (D.C. Cir., March 5, 1987) (per curiam) [812 F.2d 13 (table)].

Petitioner asked the District Court for an award of attorneys' fees and costs totalling $40,645.75. On July 29, 1987, the District Court, under Title VII, awarded him his request. The Court of Appeals reversed the attorneys' fees award, saying:

> Having chosen to invoke the Federal Court's mandamus jurisdiction, Anthony cannot at

> this time present himself as having prevailed on the merits of his Title VII claim. As is made clear by Hanrahan [v. Hampton 446 U.S. 754 (1980)] and Grubbs [v. Butz, 548 F.2d 973 (D.C. Cir. 1976)], the claimant's proof of a civil rights violation is a prerequisite to an attorney's fee award under 42 U.S.C., section 2000e-5(k).

A at 19a.

REASONS FOR GRANTING THE WRIT

I. A final determination on the merits of a substantive civil rights violation derived indirectly from exercise of Mandamus Act jurisdiction demands Title VII prevailing party status for the purpose of awarding attorneys' fees.

This case presents to this Court for the first time the problem of the relationship between rights embodied in Title VII and their enforcement through the Mandamus Act, in the context of a determination of prevailing party status

for purposes of an attorneys' fee award. The first aspect in need of determination is whether exercise of Mandamus Act jurisdiction, to the exclusion of Title VII jurisdiction, precludes an award of attorney's fees. The Court of Appeals held it did. A at 19a. Yet, this is a simplistic approach, one not demanded by Title VII itself, or by Hanrahan or Grubbs upon both of which the Court of Appeals relied. Petitioner argues that where an order issues under the Mandamus Act, which order has the effect of finally determining a civil rights violation under Title VII, then a finding of Title VII prevailing party status is required, irrespective of the jurisdictional vessel.

II. Mandamus jurisdiction is always derivative from a pre-existing non-discretionary obligation.

Actions where jurisdiction is predicated upon The Mandamus Act are derivative; jurisdiction is determined by a pre-existing mandatory duty owed to the plaintiff by the defendant, which duty the defendant failed to perform. American Association of Retired Persons v. Equal Employment Opportunity Commission, 655 F. Supp. 228 (D.D.C. 1987), rev'd on other grounds, 823 F.2d 600 (D.C. Cir. 1987); Covelo Indian Community v. Watt, 551 F. Supp. 366 (D.D.C. 1982); National Association of Rehabilitation Facilities, Inc. v. Schweiker, 550 F. Supp. 357 (D.D.C. 1982); and see Jones v. Alexander, 609 F.2d 778 (5th Cir. 1980) cert. denied 449 U.S. 832 (1980); Carpet, Linoleum & Resilient Tile, Etc. v. Brown, 656 F.2d 564 (10th Cir. 1981). In the case at bar, the underlying, mandatory duties were in the first instance established by

Title VII and its implementing regulations. Were it not for the filing of Mr. Anthony's Title VII formal complaint at the administrative level, under 29 C.F.R., Part 1613, and the agency's failure to perform its nondiscretionary duties under those laws, the jurisdiction of the District Court could not have attached through The Mandamus Act.

In Covelo Indian Community v. Watt, supra., the plaintiffs asserted that the Secretary of the Interior and other government defendants violated, inter alia, a Congressional mandate contained in section 2 of P.L. 96-217. The plaintiffs therein relied on 28 U.S.C., sections 1331 (federal question), 1361 (mandamus) and 1362 (Indian Tribes) as grounds for establishing subject matter jurisdiction in the District Court. The cause of the action, however,

was predicated under the statutory mandate contained within section 2 of P.L. 96-217.[1/] The Court, clearly distinguishing the function of the substantive statute from that of the jurisdictional enabling statute, stated that:

> To determine whether plaintiffs have stated a claim that arises under Section 2 of P.L. 96-217 and thereby confers jurisdiction through sections 1331 and 1362 as well as a claim that properly seeks injunctive relief in the nature of mandamus, whose jurisdictional root is section 1361, we must look to the complaint and the language of P.L. 96-217.

551 F. Supp at 379; emphasis supplied.

In other words, no mandamus jurisdiction

1/ The plaintiffs there also asserted the Administrative Procedure Act (APA) for the standard fo review to be applied, as P.L. 96-217 did not provide a standard. The plaintiffs had also plead the due process clause of the 5th Amendment; however, after finding jurisdiction under the statutory claims, the court found it unnecessary to address the Constitutional ground.

could obtain without the pre-existance of a substantive right. In the District Court, Mr. Anthony, as did the plaintiffs in Covelo Indian Community v. Watt, properly relied upon a substantive statute (Title VII) and its implementing regulations as the basis of his cause of action.

III. Petitioner prevailed on the merits of a substantive Title VII issue.

A. Preclusion of the reopening of an administrative determination of a Title VII violation, where the agency had expressly adopted the EEOC finding and where the agency had instituted the remedial action constitutes a substantive victory upon the merits within Hanrahan.

Mr. Anthony did prevail on his Title VII claims; he did establish entitlement to and did receive Title VII

relief; he established a Title VII violation. The District Court in discussing the special leave restriction issue found:

> Defendant [H.H.S] justifies [its having reopened the special leave issue for further investigation after adopting a finding of discrimination an awarding relief] on two grounds: (1) the termination of plaintiff's leave restrictions was unrelated to the investigation of his discrimination complaint and therefore was not part of a final disposition of his complaint, and (2 the disposition of this claim is not final since both parties can seek de novo review of the decision in federal court. Both justifications are without merit. Defendant's argument that it never executed the EEOC's proposed remedial order, but rather removed plaintiff from restricted leave status because of his improved behavior, is entirely beside the point. Both by operation of the governing regulations and its own formal adoption of the recommended disposition, the agency issued as its own remedial order the termination of plaintiff's leave status and the requirement that such procedures be applied in a non-discriminatory manner in the future. The fact that the

> agency may have earlier removed plaintiff from restricted status for other reasons in no way changes its formal disposition of his charge; Defendant's argument that the availability of de novo review renders its disposition non-final is also misplaced. Defendant relies on Moore v. Devine, 767 F.2d 1541 (11th Cir. 1985), in which the Eleventh Circuit ruled that, just as federal employees are entitled to de novo review of adverse EEOC findings, so too federal agencies may challenge in federal court EEOC rulings adverse to them. Moore, however, is simply inapposite to the present case. The agency here did not challenge the EEOC's findings, but adopted those findings as its own. Whatever right it had to de novo review of the EEOC's findings on the special leave issue was forfeited by its adoption of those findings. The mere fact that the agency had a right to such review initially cannot justify an agency's decision to reopen issues. Such a rule would render all agency dispositions of discrimination claims non-final and subject to change. Accordingly, the Court grants plaintiff's motion for summary judgment with respect to the special leave claim.

674 F. Supp. at 880; emphasis in original.

The special leave issue had been raised by Mr. Anthony in his formal EEOC Complaint:

> 3. Counseling for white employees, on the unit in which I work, is conducted in a manner to benefit those employees for communicating to them the proper manner in which to act so as to secure to them the most benefits. Black employees are counseled after the fact. For example, two White nurses were counseled on special leave, so as to avoid the procedure, while Black employees were told almost nothing until they ended upon special leave procedures. The Blacks were surprised by these procedures.
>
> 4. Special leave procedures are used against Black employees, but are rarely used against Whites.

Joint Appendix in 86-5473, p. 57.

In attempting to re-open for further investigation this aspect of the case, the agency was attempting to weasel out of the EEOC finding of discrimination, and the finding of a Title VII violation that the agency itself had

made when it adopted the EEOC findings. When the District Court in essence, said, "no, you cannot re-open that decision," after the agency had already done so (see Joint Appendix in 86-5473, p. 121, paragraphs numbered 2 and 3), Mr. Anthony was in the position of having secured or reestablished the violation of Title VII to which the agency had admitted and, as well, his entitlement to the relief stated in the agency decision. Indeed, this is a substantive Title VII relief upon the merits of his claim.

B. Court of Appeals misread Hanrahan when it concluded that the Hanrahan plaintiffs surely furthered the substantive goals of the civil rights laws..." and still did not receive attorneys' fees.

This is not the same case as with the claimants in Hanrahan v. Hampton, 446

U.S. 754, reh'g denied, 448 U.S. 913 (1980). The facts of Hanrahan were completely different from those presented here. Petitioner respectfully disagrees with the conclusion that "[t]he plaintiffs in Hanrahan surely furthered the substantive goals of the civil rights laws by obtaining a reversal on appeal of the directed verdicts that had been erroneously rendered against them." A at 20a - 21a. The point this Court was making in Hanrahan was that the substantive goals had not been furthered by the reversal of the directed verdicts. The express position of this Court was that the Hanrahan plaintiffs were left in no better position than had they "simply defeated the defendant's motion for directed verdict in the trial court." 446 U.S. at 758-759. After the District Court's decision of April 24, 1986, the petitioner here was left in a

substantively better position: The leave issue was over, and it was over in a fashion whereby he won his claim on the merits, forever, that a Title VII violation had occurred. This is not Hanrahan; the plaintiffs there made no showing of any determination of any "substantive right."

In adopting its jurisdictional vessel focus (A at 19a), the Court of Appeals blinded itself from the substantive civil rights violation of the agency which the District Court order had finally determined. 674 F. Supp. at 880. The petitioner is not only a "prevailing party" under EAJA (A at 22a), as the Court of Appeals held him to be exclusively, but he is also a "prevailing party" under Title VII.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5342 September 1987

CA 84-00385

Filed August 17, 1988

GRANT ANTHONY

APPELLEE,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health & Human Services, et al.,

APPELLANTS.

BEFORE: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG AND SENTELLE, Circuit Judges, and PALMIERI, */ Senior District Judge, United States District Court for the Southern District of New York.

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*/ Sitting by designation pursuant to 28 U.S.C., section 294(d).

ORDER

Appellee's suggestion for rehearing en banc has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

Constance L. Dupre
Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5342

September Term, 1987

CA 80-00385

Filed August 17, 1988

GRANT ANTHONY,
APPELLEE,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health & Human Services,
et al.,
APPELLANTS.

BEFORE: BUCKLEY and WILLIAMS, Circuit Judges, and PALMIERI, */ Senior District Judge, United States District Court for the Southern District of New York.

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*/ Sitting by designation pursuant to 28 U.S.C. section 294(d).

ORDER

Upon consideration of Appellee's Petition for Rehearing and Motion for Clarification, it is

ORDERED, by the Court, that the aforesaid Petition and Motion are denied.

Per Curiam

FOR THE COURT:
Constance L. Dupre
Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 25, 1988 Decided June 7, 1988

No. 87-5342

GRANT ANTHONY,
APPELLEE,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health & Human Services, et al.,
APPELLANTS.

Patricia D. Carter, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, Joseph E. diGenova, United States Attorney, at the time appellants' brief was filed, John D. Bates, R. Craig Lawrence, and Michael J. Ryan, Assistant United States Attorneys, Washington, D.C. were on the briefs, for appellants.

Glenn H. Carlson, Washington, D.C., for Appellee.

Before BUCKLEY and SENTELLE, Circuit Judges, and PALMIERI, */ United States Senior District Judge for the Southern District of New York.

Opinion for the court filed by Senior District Judge PALMIERI.

PALMIERI, Senior District Judge:

Otis R. Bowen, the Secretary of the United States Department of Health and Human Services, appeals from an award of attorney's fees made by the United States District Court for the District of Columbia in favor of the Appellee, Grant Anthony, in the sum of $40,645.75. The award resulted from an action brought by Anthony under the Mandamus Act, 28 U.S.C., section 1361 (1982).

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*/ Sitting by designation pursuant to 28 U.S.C., section 294(d).

I

On May 10, 1979, Anthony filed a formal administrative complaint with the Equal Employment Opportunity Commission (the "EEOC") alleging race and sex based discrimination by his employer, the United States Department of Health and Human Services (the "agency"). 29 C.F.R. section 1613.214 (1978). In his complaint, Anthony asserted, inter alia, that the Agency had applied special leave procedures to him in a discriminatory manner, and that the agency had discriminated against him by not selecting him for eighteen "STRIDE" (training program) positions. 1/

On August 12, 1981, after investigating Anthony's complaints, the EEOC

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*/ Anthony had previously made an informal complaint and sought counseling with an Equal Employment Opportunity counselor, as required by 29 C.F.R., section 1613.214(a)(1)(i) (1978).

propounded a Recommended Disposition of Anthony's complaint. In its Recommended Disposition, the EEOC concluded that there was reasonable cause to believe that the agency had discriminated against Anthony in applying the special leave procedures to him. It concluded that there was no reasonable cause to believe the agency had discriminated against Anthony by denying him admission to the STRIDE program. It discussed only the five positions for which Anthony had been rated highly qualified, and did not mention the other thirteen positions in the STRIDE program, all of which he had applied for.

The EEOC's Recommended Disposition was automatically adopted by the agency following the lapse of thirty days, by operation of 29 C.F.R., section 1613.216(c)(1981). In addition, the agency explicitly adopted the Recommended

Disposition as its own nearly eight months later, on April 5, 1982.

On April 21, 1982, Anthony requested a hearing with respect to the agency's denial of his claim on the STRIDE program issue. 29 C.F.R., section 1513.218(b)(1981). On December 16, 1982, the EEOC hearing examiner returned the complaint file to the agency without having conducted a hearing, based on the following: (1) "insufficient investigation;" and (2) "no letter of acceptance of Mr. Anthony's Formal Complaint of Discrimination." These reasons were stated in a form letter, with no accompanying opinion or explanation.

On March 9, 1983, the agency transmitted a letter to Anthony, informing him that it "accepted the formal complaint of discrimination" and that it would fully investigate a number of the allegations in the formal

complaint, including the special leave issue and the STRIDE issue with regard to the five position for which Anthony had been rated highly qualified.

Disagreeing with the agency's interpretation of the EEOC's mandate, Anthony, on April 20, 1983, attempted to appeal to the EEOC the agency's decision to reopen its investigation of the special leave issue and its decision not to investigate his complaint of race discrimination with regard to the thirteen STRIDE positions not mentioned in the EEOC's Recommended Disposition.

Only a final agency decision on a formal discrimination complaint may be appealed to the EEOC. 29 C.F.R., section 1613.233(a) (1983). The EEOC therefore denied Anthony's appeal, holding that his "appeal is prematurely file and is rejected. The Commission notes that the appellant may file an appeal, if he so

desires, after he has received a final agency decision on a formal discrimination complaint pursuant to 29 C.F.R., section 1613.233(a) [(1983)]." Anthony v. Department of Health and Human Services, at 1, EEOC Appeal No. 01831594 (December 28, 1983).

Anthony filed suit in the District Court for the District of Columbia on February 6, 1984, asserting jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C., sections 2000e, et seq. (1982), and seeking relief under the Mandamus Act, 28 U.S.C., section 1361 (1982), and the Declaratory Judgment Act, 28 U.S.C., sections 2201-2202 (1982). He challenged the agency's decision as to the scope of the investigation it would conduct on the two issues, but did not and could not seek to litigate the underlying merits of his Title VII complaint which, at the time

the District Court rendered its decision on the merits, was still pending. Anthony v. Bowen, 674 F. Supp 876, 877 (D.D.C. 1986).[2/]

The District Court in that decision held that the agency could not reopen its investigation with regard to the special leave issue. Its decision that the agency need not investigate his non-placement in the remaining STRIDE positions was reversed by this Court in Anthony v. Bowen, No. 86-5473, unpublished opinion at 1-3 (D.C. Cir. March 5, 1987) (per curiam) [812 F.2d 13 (Table)].

In the meantime, and after the District Court had issued its opinion, Anthony moved for an award of an attorney's fee at the rate of $150.00 per hour, pursuant to the attorney's fee

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2/ There is no indication in the record as to the current status of the agency's investigation in Anthony's claims.

provision of Title VII, 42 U.S.C., section 2000e-5(k) (1982), or, in the alternative, pursuant to the Equal Access to Justice Act, 28 U.S.C., section 2412 (1982 & Supp. III 1985). Anthony amended his attorney's fee application to include the work his attorney did on the appeal after the appellate decision of March 5, 1987.

The District Court granted Anthony's attorney's fee request in its entirety implicitly relying on the Title VII provision, Anthony v. Bowen, Civil Action No. 84-0385, slip op. (D.D.C. July 29, 1987), and this appeal followed.

II

This case serves to underscore the differences between two statutes designed to ease the burden of litigation against the government in certain situations: the attorney's fee provision of Title VII, 42

U.S.C., section 2000e-5(k) (1982),[3] and the Equal Access to Justice Act of 1980, 28 U.S.C., section 2412 (1982 & Supp. III 1985).[4] Both statutes do so by awarding

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3/ That provision reads:
Section 2000e-5(k). Attorney's fee; liability of Commission and United States for costs.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

4/ Equal Access to Justice Act reads, in part:
Section 2412. Costs and fees.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

attorney's fees to a party who prevails in a litigation against the United States Government. But the manner in which a party must "prevail" and the method of calculating his renumeration are different under each statute.

In order to come within the Title VII provision's "prevailing party" requirement, a party seeking an attorney's fee must have "prevailed on the merits" of a discrimination claim by demonstrating actual discrimination in violation of Title VII, See Grubbs v. Butz, 548 F.2d 973, 975-76 (D.C. Cir. 1976), cited with approval in Hanrahan v. Hampton, 446 U.S. 754, 759 n.4, (construing the Civil Rights Attorney's Fee Act of 1976 to the same effect),

reh'g denied, 448 U.S. 913 (1980). In contrast, a "prevailing party" for[5/] purposes of the Equal Access to Justice Act, need only have succeeded "on any significant issue in litigation which achieves some of the benefit sought in bringing suit." Hirschey v. Federal Energy Regulatory Commission, 760 F.2d 305, 309 n.20 (D.C. Cir.) (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), app. after remand, 777 F.2d 1 (D.C. Cir. 1985).

The two statutes also differ significantly in the method of determining the amount of compensation available to parties who properly invoke them. The

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5/ The 1976 Civil Rights Attorney's Fee Act was patterned on the attorney's fee provisions of the Civil Rights Act of 1964, including that contained in Title VII. Hanrahan v. Hampton, supra, 446 U.S. at 758 n.4, (citing S. Rep. No. 94-1011, p. 2 (1976); H.R. Rep. No. 94-1558, p.5

Title VII provision does not set a limit on the rate of compensation for an attorney whose fee is paid under its auspices. Awards at the rate of $150.00 per hour, as was the case here, are not unheard of. See Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 55, 59 (D.C. Cir. 1987) (Wald, C. J., concurring in part, dissenting in part), reh'g en banc granted, 830 F.2d 1182 (D.C. Cir. 1987).

The maximum rate of remuneration for an attorney's fee award under the Equal Access to Justice Act was set in October 1981 at $75.00 per hour. 28 U.S.C., section 2412(d)(2)(A)(ii) (1982 & Supp. III 1985). That rate is adjusted yearly for inflation. Ibid.; see Massachusetts Fair Share v. Law Enforcement Assistance Administration, 776 F.2d 1066, 1069 (D.C. Cir. 1985); Action on Smoking and Health v. C.A.B.,

724 F.2d 211, 218 (D.C. Cir. 1983).

In granting Anthony's fee request in its entirety, the District Court implicitly relied upon the attorney's fee provision of Title VII: it based the award on a rate of $150.00 per hour and discussed the Supreme Court's opinion in Hanrahan. Because we find that Anthony has not prevailed on the merits within the purview of the applicable statutory provision, 42 U.S.C., section 2000e-5(k) (1982), we must vacate the District Court's judgment.

The record contains no mention of the final disposition of Anthony's actual Title VII claims. We can only assume that investigation and resolution of those claims are not yet final. It was for that reason that the EEOC held that Anthony's appeal was premature under 29 C.F.R., section 1613.233(a), and that both the District Court and this Court

held that Anthony's claims did not arise under Title VII. Instead, we held that Anthony was entitled to relief pursuant to the Mandamus Act, 28 U.S.C., section 1361 (1982). The District Court's final order directed the agency to pursue its investigation of Anthony's civil rights claims regarding certain issues and not to investigate others.

Having chosen to invoke the Federal Court's mandamus jurisdiction, Anthony cannot at this time present himself as having prevailed on the merits of his Title VII claim. As is made clear by Hanrahan and Grubbs, the claimant's proof of a civil rights violation is a prerequisite to an attorney's fee award under 42 U.S.C., section 2000e-5(k).

Anthony's argument that he won everything he sought in this litigation confuses the "prevailing party" requirement of the Title VII provision

with that of the Equal Access to Justice Act. The kind of victory Anthony won comports with an award under the Equal Access to Justice Act. Hirschey v. Federal Energy Regulatory Commission, supra, 760 F.2d at 309 n.20. No matter how successful he was in litigating the issues he came to court to redress, he cannot come with the Title VII violation. Hanrahan, supra, Grubbs, supra.

Anthony attempts to avoid this requirement by arguing that the Mandamus Act is merely a jurisdictional vessel, and that since he furthered the substantive goals of Title VII, he should be entitled to an award under the Title VII provision. The clear import of Hanrahan and Grubbs leave no room for that argument. The plaintiffs in Hanrahan surely furthered the substantive goals of the civl rights laws by obtaining a reversal on appeal of the

directed verdicts that had been erroneously rendered against them. See Hanrahan, supra, 446 U.S. at 755. Despite that fact, the Court said that "it seems clearly to have been the intent of Congress to permit [the award of fees pendente lite] only to a party who has established his entitlement to some relief on the merits of his [civil rights] claims, either in the trial court or on appeal." Id. at 757. Just as plaintiffs in Hanrahan had not yet established the validity of their civil rights claims, Anthony has not yet established the validity of his. He has won the right to have his STRIDE claims investigated. He has won the right to preclude further investigation of his special leave procedures claim. Those victories, without more, cannot establish his success on the merits of either claim. No final disposition at any

administrative level of any of his Title VII claims appears in the record. At a minimum, the remaining administrative investigation and hearing must take place first. Anthony is not, therefore, entitled to an award under the Title VII provision.

However, for purposes of the Equal Access to Justice Act, Anthony is a prevailing party in this litigation. Hirschey v. Federal Energy Regulatory Commission, supra, 760 F.2d at 309 n.20. He came to court seeking interlocutory supervision of the administrative processing of his discrimination claims. He sought to prevent further investigation of one claim, and won. He sought to force investigation of other claims, and won.

Basing its award upon the Title VII provision, the District Court did not reach the issue whether the government's

position was "substantially justified" as is required under the Equal Access to Justice Act. See, e.g., Federal Election Commission v. Rose, 806 F.2d 1081, 1086-92 (D.C. Cir. 1986).

We therefore vacate the judgment of the District Court and remand for determination of Anthony's entitlement to an attorney's fee award under the Equal Access to Justice Act, and for entry of an appropriate order.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 84-0385

Filed July 29, 1987

GRANT ANTHONY
PLAINTIFF,

v.

OTIS R. BOWEN
DEFENDANT.

OPINION AND ORDER

Before the Court is plaintiff's supplemental request for attorney's fees and defendant's opposition thereto. The Court finds plaintiff is entitled to the relief he seeks and will therefore enter an appropriate order and accompanying judgment.

In his supplemental request, plaintiff seeks $40,645.75 in attorney's fees for work performed in the prosecution of

this suit both before this Court and the Court of Appeals. Defendant does not challenge the reasonableness of the time spent on this work or the hourly rates charged for it. Rather, the government contends that plaintiff has, to date, won nothing more than a procedural victory for which, under controlling case law in this circuit, he is not entitled to compensation. The Court cannot agreee.

Both here and in the appellate court, plaintiff sought "an order directing defendant to investigate certain of his claims of discrimination . . . and an order barring defendant from 'reopening' an investigation into another claim of discrimination [the "leave" issue] that [he contends] has been resolved in his favor." Anthony v. Bowen, No. 84-0385, slip op. at 1 (D.D.C. Apr. 25, 1986). This Court found in favor of plaintiff on his leave claim but declined

to order defendant to broaden the scope of its investigation. The Court of Appeals affirmed the Court's disposition of the leave issue but reversed on the scope of the investigation claim. Anthony v. Bowen, No. 86-5473 (D.C. Cir. Mar. 5, 1987). Upon remand this Court dismissed the case with an order directing defendant to broaden the investigation to include the additional charges of discrimination plaintiff seeks to raise. His civil rights claim for full administrative investigation was therefore ultimately determined to be non-frivolous and clearly more than colorable. Plaintiff has obtained the full relief he sought in these judicial proceedings.

Defendant characterizes plaintiff's success as an "interlocutory disposition," Defendant's Opposition at 1, and argues that plaintiff has not yet

"demonstrated even the slightest probability of success on the merits." Id. at 2. Plaintiff, however, has clearly won more than a mere procedural victory - he prevailed on the merits of his claims that defendant could not reopen the leave issue previously decided in his favor, and that defendant was required to investigate the additional charges he wished to prosecute administratively. As this circuit has explained:

> In "procedural victory" cases such as Hanrahan [v. Hampton, 446 U.S. 754 (1980)] the party is held not to have prevailed because his litigation goals are clearly not satisfied by the procedural victory. For example, when an appellate court rules that a trial on an issue must be held, the plaintiffs have not prevailed; "[a]s a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendant's motion for a directed verdict in the trial court." Hanrahan, 446 U.S. at

> 758-59 ... In such cases the procedural victory relates only to the litigation process, and the plaintiffs have not prevailed on what they originally came into court for. Here, by contrast, the victory represented a substantial part of what plaintiffs asked the court for in the first place.

Grano v.Barry, 783 F.2d 1104, 1109-10 (D.C. Cir. 1986) (emphasis in original). In the present case, while plaintiff did not prevail on each and everyone of his legal theories, he received essentially everything he sought by way of relief. Accordingly, he is entitled to recover attorney's fees. See also Massachusetts Fair Share v. Law Enforcement Assistance Administration, 776 F.2d 1066, 1068-69 (D.C. Cir. 1985) (plaintiffs who obtained court order that two agencies -- instead of one -- had to make decision on grant were prevailing party since "this is precisely the point that [plaintiffs] litigated, and won"); Bagby v.Beal, 606

F.2d 411, 415 (3d Cir. 1979) (plaintiff who obtained court order granting her a due process right to administrative hearing was prevailing party even though the hearing eventually affirmed her dismissal). There are no special circumstances here that would render such an award unjust.

For all the foregoing reasons, it is hereby

ORDERED that plaintiff, Grant Anthony, be an hereby is entitled to attorney's fees and expenses, as requested, and as reflected on the accompanying judgment.

IT IS SO ORDERED.

/s/
JOYCE HENS GREEN
United States District Judge

July 29, 1987

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

No. 84-0385

Filed July 29, 1987

GRANT ANTHONY,
PLAINTIFF,

v.

OTIS R. BOWEN,
DEFENDANT.

JUDGMENT

In consideration of the Opinion and Order entered this date awarding plaintiff his attorney's fees and expenses, judgment is hereby entered in favor of the plaintiff, Grant Anthony, and against defendant, Otis R. Bowen, Secretary, Unites States Department of Health and Human Services, in the amount of forty thousand six hundred forty-five dollars and seventy-five cents ($40,645.75).

/s/
JOYCE HENS GREEN

United States District Judge

July 29, 1987

APPENDIX E

Civil Rights Act of 1964, 42 U.S.C.

Section 2000e-5(k). Attorney's fee; liability of Commission and United States for costs.

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Equal Access To Justice Act, 28 U.S.C. Section 2412. Costs and fees.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other eXpenses... incurred in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-803

In the Supreme Court of the United States

OCTOBER TERM, 1988

GRANT ANTHONY, PETITIONER

v.

OTIS R. BOWEN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-803

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OTIS R. BOWEN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that he is not a "prevailing party" entitled to an attorney's fee award under the fee-shifting provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), 2000e-16(d).

1. This is an attorney's fee case arising out of claims that the Department of Health and Human Services violated provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* On May 10, 1979, petitioner filed a formal administrative complaint with the Equal Employment Opportunity Commission (EEOC) alleging that his employer, the Department of Health and Human Services (HHS), had discriminated against him on the basis of race and sex in the application of its procedures

for special leave and in the denial of his requests for promotion (Pet. App. 7a). In its recommended disposition of these allegations, the EEOC concluded that there was reasonable cause to believe that the agency's application of its special leave policy to petitioner was racially motivated but found no probable cause to believe that the promotion decisions challenged in the complaint resulted from discrimination (*id.* at 8a).

On April 5, 1982, eight months after issuance of the EEOC report, HHS formally adopted the EEOC's findings and recommendations as its own (Pet. App. 9a). Petitioner then requested a hearing before an EEOC examiner on the promotion issue (*ibid.*). The hearing examiner subsequently remanded the complaint to HHS because it had failed to provide petitioner with a letter stipulating the issues accepted for investigation and because the examiner deemed HHS's preliminary investigation inadequate (*ibid.*). On remand, HHS indicated that it would (1) investigate the promotion decisions challenged in petitioner's formal complaint, (2) refuse to investigate other promotion decisions not explicitly challenged in petitioner's complaint, and (3) reopen for further investigation the issue of whether it had discriminated against petitioner in placing special restrictions on his use of leave (*id.* at 9a-10a).

On February 6, 1984, petitioner filed suit in district court to compel the agency to investigate additional promotion decisions beyond those expressly identified in the administrative complaint and to bar the agency from reopening the leave issue (Pet. App. 10a). He asserted jurisdiction under Title VII of the Civil Rights Act and sought relief under the Mandamus Act, 28 U.S.C. 1361, and the Declaratory Judgment Act, 28 U.S.C. 2201, 2202 (Pet. App. 11a-12a). He did not, however, seek to litigate the merits of the underlying Title VII complaint, which was

still pending before HHS at the time the district court rendered its decision (*id.* at 12a).

Without addressing the basis for its jurisdiction, the district court held that HHS could properly limit its investigation to those promotion decisions identified in the administrative complaint and the EEOC's recommended disposition. See *Anthony* v. *Bowen*, 674 F. Supp. 876, 878-880 (D.D.C. 1986). With respect to the leave issue, however, the court ruled for petitioner, holding that HHS could not conduct further administrative investigation on this matter because it had finally decided the question by adopting the EEOC's recommended disposition and had "issued as its own [the EEOC's] remedial order" (*id.* at 880).[1]

Petitioner appealed from the district court's determination that HHS need not expand its promotion investigation. In an unpublished memorandum opinion (App., *infra*, 1a-4a), the court of appeals reversed and remanded. The court maintained that employment discrimination complaints were to be broadly construed and that post-complaint evidence adequately apprised the agency of petitioner's intention to place in issue additional promotion decisions (*id.* at 3a). The court further noted that petitioner was not seeking adjudication of the merits of his underlying discrimination claim, and that his action did not arise under Title VII of the Civil Rights Act (App., *infra*, 4a). The court added that "[a]lthough the government has not raised the point by cross appeal, we have grave doubts whether the mandamus statute, 28 U.S.C. 1361, is properly deployed" for monitoring the agency's handling of the Title VII administrative complaint (*ibid.*).

[1] According to the district court, the agency agreed to "terminat[e petitioner's] leave status" and "require[ ] that [special leave] procedures be applied in a nondiscriminatory manner in the future" (674 F. Supp. at 880).

Thereafter, the government petitioned for rehearing on the ground that the district court lacked jurisdiction. That petition was denied (Gov't C.A. Br. 3 n.2).

2. Petitioner then moved in the district court for an award of attorney's fees under Title VII, or, alternatively, under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. On consideration of the request, the district court observed that petitioner had "prevailed on the merits of his claims that defendant could not reopen the leave issue previously decided in his favor, and that defendant was required to investigate the additional charges he wished to prosecute administratively" (Pet. App. 27a). Without citing the statutory basis for the award, the court concluded that petitioner had obtained "the full relief he sought in these judicial proceedings" (*id.* at 26a), and awarded him $40,645.75 in fees (*id.* at 29a-31a).

The court of appeals vacated the judgment and remanded for further proceedings (Pet. App. 5a-23a). As an initial matter, the court of appeals determined that the district court had implicitly awarded attorney's fees under the fee-shifting provisions of Title VII and not under EAJA (Pet. App. 18a).[2] The court then asserted that although the petitioner had achieved the object of his litigation—an order controlling the scope of the administrative investi-

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[2] As noted above, the district court did not specify the statutory basis of its award. The court of appeals reasoned, however, that (1) the district court had based the award on a fee rate of $150 per hour—in excess of EAJA's $75 per hour presumptive fee cap, (2) the district court, in determining fee entitlement, had discussed this Court's decision in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980)—a Title VII case, and (3) the district court failed to determine whether the government's conduct was "substantially justified"—a prerequisite to awarding fees under EAJA. See Pet. App. at 17a-18a, 22a-23a.

gation – he had not obtained a judicial decree concerning the underlying merits of his civil rights claims (*id.* at 18a-22a).[3] The court also reasoned that the petitioner could not claim to have "prevailed" on the merits of a claim arising under Title VII in an action maintained under the Mandamus Act (Pet. App. 18a-19a). Relying on this Court's opinion in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), the court concluded that the petitioner failed to satisfy Title VII's "prevailing party" requirement for the award of attorney's fees, 42 U.S.C. 2000e-5(k).[4]

The court further ruled that petitioner had succeeded on a significant issue in the litigation and had therefore prevailed for purposes of the fee-shifting provisions of EAJA (Pet. App. 16a, 22a). It therefore remanded the case for a determination of whether the government's position was "substantially justified" within the meaning of that statute (*id.* at 22a-23a). Petitioner now challenges the court of appeals' determination that he is not eligible for a fee award under Title VII.

3. The holding below is limited to the highly unusual facts and procedural posture of this case and arises out of the erroneous assumption of mandamus jurisdiction by the district court. For this reason, the case has little if any

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[3] The court rejected the contention that the mandamus order had conclusively disposed of any Title VII claims, explaining that "[t]he record contains no mention of the final disposition of Anthony's actual Title VII claims. We can only assume that investigation and resolution of those claims are not yet final" (Pet. App. 18a). See also *id.* at 21a-22a.

[4] This provision states that, "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." Under 42 U.S.C. 2000e-16(d), this provision is made applicable to civil actions alleging discrimination in employment by the Federal Government.

prospective significance and does not warrant further review.

Petitioner asserts (Pet. 15) that success on the merits of his mandamus action entailed success on the merits of a Title VII claim. He maintains that the district court's order forbidding the reopening of HHS's investigation of the leave issue rendered final and conclusive HHS's adoption of the EEOC's finding of discrimination, and thus established his entitlement to relief under Title VII. The court of appeals disagreed with petitioner that the result of the district court action could be characterized as a final determination of this Title VII claim of discrimination in the granting of special leave. It also denied that petitioner could "prevail" in a discrimination claim within the meaning of the Title VII fee-shifting provision on the basis of success in an action brought under another statute.

The question whether petitioner could be considered to have "[ ]established [a] violation of Title VII * * * [and] his entitlement to the relief stated in the agency decision" (Pet. 15) through success in an action brought under the Mandamus Act does not warrant this Court's consideration. The issue pressed by petitioner is unlikely to recur with any frequency because it arises out of the district court's inappropriate assumption of mandamus jurisdiction over Title VII claims that were still pending before the administrative agency.

Although the court of appeals declined to reach the question of the district court's subject matter jurisdiction in the absence of a cross appeal by the government, it nonetheless expressed "grave doubts" as to whether the mandamus statute was a proper basis for district court jurisdiction in this case.[5] We submit that the court's

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[5] The court of appeals plainly could have addressed the issue of subject matter jurisdiction *sua sponte*—a fact that further emphasizes the

doubts were justified. Under well-established doctrine, mandamus jurisdiction is properly invoked only when no other adequate remedy is available and the petitioner would otherwise be prejudiced in a way not correctable on appeal. See, *e.g.*, *City of Highland Park* v. *Train*, 519 F.2d 681, 691 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *Council of and for the Blind* v. *Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (*en banc*); *Levine* v. *U.S. District Court for the Central District of California*, 764 F.2d 590, 593 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); see also *Ex parte Peru*, 318 U.S. 578, 584 (1943). Petitioner's case did not satisfy these conditions, as Title VII provided an adequate alternative remedy for any error committed by the agency in its consideration of petitioner's discrimination charge. Had HHS's investigation concerning special leave been reopened and the underlying matter resolved against petitioner, he could have asserted the illegality of the agency's decision to reopen in a Title VII lawsuit to review *de novo* the agency's final determination. See 42 U.S.C. 2000e-5(f)(1). Thus, an adequate statutory remedy to protect petitioner's rights was available under "the very statute that create[d] the rights." *City of Highland Park* v. *Train*, 519 F.2d at 692. Moreover, if petitioner had prevailed in his Title VII lawsuit, he would have obtained the same relief he obtained through success in his mandamus action. Accordingly, petitioner would have suffered no prejudice if the district court had refused to issue the writ.

Additionally, the use of this extraordinary writ to interfere with ongoing administrative proceedings, as occurred in this case, engenders unnecessary litigation and disrupts the administrative process. Interim actions that are not immediately reviewable on interlocutory appeal should not

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peculiar posture of this case and the limited prospective significance of the court's holding on petitioner's attorney's fee application.

be reviewed by means of the alternative device of mandamus. See *In re Special March 1974 Grand Jury*, 541 F.2d 166, 172 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977)) (mandamus relief denied where the plaintiff merely contested the procedural aspects of the ongoing grand jury investigation rather than the merits of his defense).

In light of the erroneous use of mandamus in this case, it is unlikely that a significant number of other cases will raise the question of whether a party who prevails in a mandamus action brought to enforce Title VII can be a prevailing party within the meaning of the statute's fee-shifting provisions. This case therefore does not present an issue of recurring, prospective significance that warrants further review. Moreover, petitioner may yet receive some reimbursement under EAJA for expenses incurred in the mandamus action. The fact that EAJA provides an alternative source of attorney's fees for the rare plaintiff who prevails in a mandamus action during the course of Title VII administrative proceedings further diminishes the importance of the question whether fees are available under Title VII in these circumstances.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1989

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5473
Civil Action No. 84-00385

GRANT ANTHONY, APPELLANT

v.

OTIS R. BOWEN, SECRETARY,
HEALTH & HUMAN SERVICES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Mar. 5, 1987]

JUDGMENT

Before: RUTH B. GINSBURG and BUCKLEY, Circuit Judges, and FAIRCHILD, *Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

This appeal was considered on the record from the United States District Court for the District of Columbia and was briefed and argued by counsel. Upon review of the issues and arguments presented, the court concludes that the case occasions no need for a published opinion.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

See D.C. Cir. R. 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the orders from which this appeal has been taken be affirmed in part and reversed in part. The case is hereby remanded to the district court with instructions to return it to the agency so that Anthony may promptly receive a complete administrative ruling on the full (eighteen opportunity) discrimination claim he attempted to present. It is

FURTHER ORDERED, by this Court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court
/s/ George A Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

The district court correctly observed that "complaints in employment discrimination cases are to be broadly construed." *Anthony v. Bowen*, No. 84-0385, slip op. at 6 (D.D.C. Apr. 25, 1986). It further recognized that issues raised at the pre-complaint counseling stage should not be read, automatically, into the formal administrative complaint because "[t]he whole purpose of requiring initial recourse to informal dispute resolution efforts is to eliminate or reduce the matter at issue before the formal administrative machinery is set in motion." *Id.* at 7. In this case, however, post-complaint evidence should have revealed to the agency that Anthony's formal complaint, filed May 10, 1979, was intended to place at issue his non-selection for eighteen "Stride" (training program) slots.

In an account of Anthony's formal complaint prepared August 9, 1979, for example, the EEO investigator acknowledged Anthony's protest that work evaluations unfairly describing his performance resulted in his non-selection "for any of the eighteen [Stride] positions." Joint Appendix (J.A.) at 103. This grievance, referring to eighteen slots, was essentially repeated in the November 2, 1979 *Statement of Allegations Made in a Federal Formal Complaint*, prepared by the EEO officer and signed by Anthony. J.A. at 106. This latter document also noted Anthony's concern that his non-selection for any of the eighteen Stride positions was related to the discriminatory application of special leave procedures to him. The agency was remiss in failing to recognize that the generous approach we apply to court complaints charging employment discrimination should hold as well for agency inspection of administrative complaints in this area. *See Brown v. Marsh*, 777 F.2d 8 (D.C. Cir. 1985); *President v. Vance*, 627 F.2d 353 (D.C. Cir. 1980). While a complainant in

Anthony's situation should not be indulged to the point of allowing him to resurrect a claim he deliberately abandoned, neither should he be stopped from pursuing a claim he stated comprehensibly, albeit without the cogency or art of an expert pleader. Where, as here, the complainant's allegations are discernible, the agency must attend to those allegations.

We note, further, that the district court was unquestionably correct in holding that the court complaint Anthony tendered did not arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* For reasons of economy, Anthony prefers to remain on an administrative track. He wants the court to monitor the agency's administrative performance, but not to take hold of the case for an adjudication on the merits of his race and sex discrimination in employment charges. Although the government has not raised the point by cross appeal, we have grave doubts whether the mandamus statute, 28 U.S.C. § 1361, is properly deployed for such monitoring. If the mandamus were appropriate, however, it should have extended to all eighteen Stride positions. Finally, we observe that the venue question debated when this case was new retains no vitality as the case is now postured. We therefore discard that issue as moot.

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No. 88-803

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary,
United States Department
of Health and Human Services, et al.

Respondents.

MEMORANDUM IN REPLY
and APPENDIX

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No. 88-803

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GRANT ANTHONY,

Petitioner,

v.

OTIS R. BOWEN, Secretary
United States Department of
Health and Human Services, et al.,

Respondents.

MEMORANDUM IN REPLY

I. Introduction.

What was at stake in the substantive proceedings below was, simply, the integrity of the administrative process under Title VII. The respondent would have this court believe that the statutory scheme provides adequate remedies beyond the administrative scheme and therefore the petitioner

would have suffered "no prejudice" had the district court refused to issue the writ of mandamus. Memorandum of Respondent in Opposition ("Opp."), p. 7. This is not the case. As the district court rightfully pointed out in its unpublished jurisdictional order of June 25, 1985 (annexed hereto at Reply App., p. 1a, et seq.):

> More fundamentally, one purpose of Title VII's provision for an administrative remedial scheme is to facilitate conciliation. A precondition to meaningful conciliation is the agency's recognition of the full scope of the alleged discrimination. If the agency's view of the complaint -- and corresponding limits on the investigation -- are unduly narrow, plaintiff's remedy under Title VII is not adequate and mandamus may be appropriate.

Reply App., pp. 14a-15a. By arbitrarily narrowing the scope of the investigation, the respondent here did attempt to prejudice the petitioner, and attempt to deny to him complete access to the

administrative process, including conciliation. In so doing, the respondent wrongfully attempted to shift the costs of going forward from the agency on to this GS-5 government employee. Further, the bad faith of the agency in this matter continues.

II. Supplemental Statement of the Case.

Upon petitioner's November 1, 1988 motion to the district court to reopen the proceedings there and to hold the respondent in contempt for violation of the order of that court of June 12, 1987, and of the order of the United States Court of Appeals for the District of Columbia Circuit of March 5, 1987, Appendix to Opposition ("Opp. App."), p. 1a, et seq., on December 27, 1988, the district court issued its opinion and order. This document appears in full at Reply App., p. 20a, et seq., below. In that December 27, 1988 ruling, the

district court held that the respondent had violated its June 12 order; the respondent had not conducted the required investigation. Reply App., p. 29a. The district court, however, refused to hold the respondent in contempt, giving the agency still yet another 180 days within which to comply with said orders to investigate the claims of the petitioner. The district court did reopen the case, did retain supervisory jurisdiction over the investigation of the claims of the petitioner, and did indicate that if by June 25, 1989 the investigation was not completed, it would then consider the motion for contempt. The facts giving rise to the initial cause continue to obtain five years later despite the two favorable orders of court which give rise to the attorneys fees issue here. The attorneys fee provisions of Title VII were designed to aid low income persons in

the redress of their rights. The decision of the circuit court in this matter vitiates that statutory intent.

III. Errors in Respondent's Memorandum.

A. Factual.

The respondent errs in stating that the district court did not address the jurisdictional issue. Opp., p. 3. The court did so, fully and coherently in its June 25, 1985 order. Reply App., p. 1a, et seq., below; and see Opp. App., p. 4a.

Second, not only did the petitioner appeal from the district court order of April 25, 1986, 674 F. Supp. 876 (D.D.C. 1986), so too, did the respondent. Opp., p. 3; and note "absence of cross appeal by the government" language at Opp., p. 6; and see Reply App., p. 24a. Technically, petitioner filed a cross-appeal, as respondent appealed first from the April 25, 1986 order. The respondent, upon instruction from the

Department of Justice, then voluntarily withdrew (dismissed) its appeal. The circuit court in turn directed petitioner to assume the role of appellant. The result was the March 5, 1987 circuit court order.

B. Legal.

Legally the assumption of mandamus jurisdiction was proper. The court of appeals did not question the propriety of mandamus jurisdiction. What it questioned was the issuance of the writ, i.e., "whether the mandamus statute... is properly deployed for ... monitoring" the processing of Title VII claims at the administrative stage. Opp. App., p. 4a. The court of appeals, however, did utilize the writ to order the investigation of all eighteen Stride positions. Ibid.

IV. Argument In Reply.

1. The respondent attempts to shift

the focus of the issue before this court for which certiorari is requested from that of whether attorney's fees are to be awarded under Title VII or under EAJA to the appropriateness of the use of mandamus by the district court and the Court of Appeals for the District of Columbia Circuit. The respondent appealed from the district court order by which relief in the nature of mandamus was granted, and then he dismissed his appeal. Although respondent asked the circuit court for reconsideration of its March 5, 1987 order, which was denied, it did not bring the use of mandamus by either court to this court's attention. The issue of the appropriateness of mandamus is, thus, without viability and is not before this court. Parenthetically, it is not at all certain that a writ of mandamus was ever issued; with proper 28 U.S.C., section 1361 juris-

diction, declaratory relief could have been granted under 28 U.S.C., sections 2201-2202. See Reply App., p. 5a n. 1.

2. There is no doubt as a matter of fact that the special leave issue is over, a final determination has been made by the district court. The question is whether as a matter of law, the district court's foreclosure of the reopening of that issue constitutes a proper predicate for a Title VII attorneys' fee award. The respondent ducks this issue. The respondent pegs its posture to the statements of the court of appeals that the court did not know of the outcome of the remaining claims of illegal discrimination. Opp., p. 5 n. 3. Yet it is abundantly clear that the special leave procedure issue was then out of the hands of the agency, excepting for the attorneys' fee award associated therewith. 674 F. Supp. at 880. Thus, the

court of appeals references to its not knowing the posture of the investigations could not refer to the special leave restriction issue upon which petitioner prevailed. Rather they encompass only the fourteen remaining Stride slots and their investigations by the agency.

3. The respondent's assertion that this case does not warrant review by this court on the basis that it does not "present an issue of recurring, prospective significance" is disingenuous. Opp., p. 8. Even if there were such a requirement, it is clearly satisfied here. As the pleadings below demonstrate, what is at issue in this case are fundamental aspects of Title VII litigation, to wit: the concept and definition of "prevailing party" and its relation to the government's impermissive narrowing of Title VII. Likewise, the relation between The Mandamus Act, as an

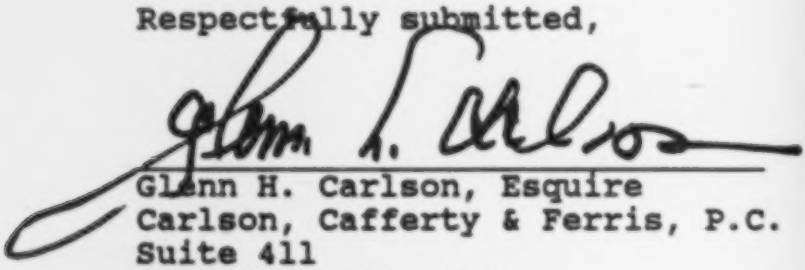
enabling statute, to Title VII is at issue. The attorney's fee provision of Title VII is, without question a significant component of the overall statutory scheme. The effectiveness of that statute, particularly in relation to low income litigants, is directly dependent upon the applicability of the attorneys' fees provision. This case is no less significant than those Title VII attorneys fees cases previously addressed by this court, e.g., Hanrahan v. Hampton, 446 U.S. 754, reh'g denied, 448 U.S. 913 (1980), upon which in this case the circuit court hung its hat.

V. Conclusion.

This case does, therefore, present an important, unsettled question of federal law, in fact a case of first impression, worthy of consideration by this court. Petitioner renews his prayer that his petition for the issuance of a

writ of certiorari issue from this court to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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APPENDIX F

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF COLUMBIA

Civil Action No. 84-0385

GRANT ANTHONY,

Plaintiff,

v.

MARGARET M. HECKLER,

Defendant.

ORDER

Plaintiff Grant Anthony brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e et seq., as amended ("Title VII"), and the Mandamus Act, 28 U.S.C., section 1361, to challenge the scope of the ongoing administrative processing of his complaint of employment discrimination. Currently before the Court is the motion of defendant Margaret M. Heckler, Secretary, United States Department of

Health and Human Services ("HHS"), to dismiss the complaint or, in the alternative, for summary judgment.

Before responding to defendant's motion, plaintiff requested leave to take discovery and to obtain and file the administrative record of the underlying discrimination complaint. Plaintiff's requests were denied by Order dated December 20, 1984, on the basis that the "purely legal issues" raised by defendant's motion to dismiss did not call for discovery or the filing of the record of the administrative processing. That Order further provided that "should defendant's motion [to dismiss the complaint] be denied, and should the Court decide to consider defendant's alternative motion for summary judgment, plaintiff's motion to permit discovery, if renewed, shall be considered . . . ." Dec. 20, 1984 Order at 2. Since that

Order issued, the parties have presented their positions on the motion to dismiss through a barrage of supplemental memoranda, all of which have been fully considered. For the reasons stated below, this action will in part survive defendant's motion to dismiss and shall proceed to summary judgment or trial.

At all relevant times, plaintiff, a black male, has been employed as a psychiatric patient care technician at the National Institutes of Health ("NIH"), a branch of HHS. On May 10, 1979 he filed with the agency a formal administrative complaint, alleging race-based and sex-based discrimination in his nonselection for various positions offered in NIH's 1978-79 Stride Program. His current complaint regarding the agency's processing of the 1979 administrative complaint is twofold. First, he challenges HHS' decision not to

investigate, on remand from the Equal Employment Opportunity Commission ("EEOC"), his unsuccessful application for fourteen of the eighteen Stride Program positions allegedly encompassed by the 1979 complaint. The agency did accept for investigation on remand plaintiff's discrimination claims as to the four positions for which plaintiff had been found highly qualified. Defendant now contends, against plaintiff's opposition, that the 1979 administrative complaint addressed only those four jobs.

Plaintiff also challenges defendant's decision to investigate on remand the issue of discriminatory application of leave procedures. According to plaintiff, the leave issue has already been the subject of a final agency decision. Plaintiff concedes that he has requested a hearing as to whether

that decision should have included an award of attorney's fees, but he maintains that the agency has no discretion to reopen investigation of the merits of the leave issue. Defendant denies entering a final agency decision on any aspect of the leave issue. The question now before this Court is whether, if plaintiff's factual allegations are correct, see Conley v. Gibson, 355 U.S. 41 (1957), he can state a claim actionable under Title VII and/or the mandamus statute.[1/] Because mandamus would be inappropriate if plaintiff's

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1/ Both parties recognize that if jurisdiction is proper under either or both of those statutes, plaintiff's request for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. sections 2201-2202, will withstand defendant's motion to dismiss.

claim is redressable under Title VII, see generally Ganem v. Heckler, 746 F.2d 844, 849 (D.C. Cir. 1984), citing Heckler v. Ringer, ___ U.S. ___, 104 S. Ct. 2013 (1984), the Title VII issue must be addressed first.

The EEOC regulations promulgated under Title VII provide pertinent part that:

> An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended, 84 Stat. 112, to file a civil action in an appropriate United States district court.
>
> (a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint.
>
> (b) After one hundred and eighty (180) calendar days

> from the date of filing a complaint with the agency if there has been no decision.
>
> . . . .
>
> [The decision] of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs.

29 C.F.R., section 1613.281.[2/] Even if, as plaintiff contends, (1) defendant has entered a final agency decision on the leave issue and (2) the decision to investigate plaintiff's nonselection to only four positions constitutes a final rejection of palintiff's claims as to the remaining fourteen positions, "all of the

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2/ Part (b) of this regulation is not at issue.

issues" presented in plaintiff's administrative complaint have not been decided: there is no question that the agency investigation of plaintiff's nonselection to at least four positions addressed in that complaint is ongoing. Accordingly, Title VII does not afford a cause of action given the current posture of this case.[3/] Plaintiff's right to relief, if any, must be litigated under the madamus statute.

The Mandamus Act "provides an independent grant of [federal court] jurisdiction", Welch v. Donovan, 551 F.

3/ Before filing this complaint, plaintiff appealed to the EEOC the issue of the scope of the agency investigation on remand. The EEOC denied the appeal as premature, but advised plaintiff that he had a right to file a federal court action to pursue the matter further. Complaint, Exh. 1. Due to the posture of plaintiff's discrimination complaint at the agency level, the EEOC's notice of right to sue was clearly in error.

Supp. 809, 810 (D.D.C. 1982), "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C., section 1361.

> As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available.

Ganem v. Heckler, 746 F.2d at 852 and cases cited therein.

In its motion to dismiss, defendant argues that the scope of defendant's investigation of discrimination claims is a discretionary matter and that mandamus

relief would improperly interfere with the agency's administrative processing of plaintiff's complaint. In fact, the very EEOC regulation relied upon by defendant demonstrates that an agency's discretion to reject claims raised by a complainant is subject to limitations.

> The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of section 1613.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency.

29 C.F.R., section 1613.215. Under this

regulation, an agency is authorized to reject allegations only under certain circumstances. See Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980) (additional exceptions are not to be inferred in the absence of evidence of a contrary intent). Defendant does not contend that plaintiff's nonselection for the fourteen Stride Program positions in dispute is the subject of a previous pending complaint filed by plaintiff or that it is a matter outside the purview of section 1613.212 (regarding coverage of Title VII). However, defendant does argue that plaintiff is now--untimely--seeking to enlarge the scope of his 1979 agency complaint to encompass the fourteen positions not under investigation. If, as plaintiff alleges, the 1979 complaint placed at issue his nonselection for eighteen separate jobs,

defendant has neither authority nor discretion under 29 C.F.R., section 1613.215 to decline to investigate plaintiff's claims as to all but four positions. Moreover, case law cited by defendant in no way established that the mandamus remedy is unavailable to compel agency investigation of claims timely raised and not subject to rejection. Cf. Feldstein v. EEOC, 547 F. Supp. 97, 101 (D. Mass. 1982) (mandamus action against EEOC unavailable where plaintiff can fully vindicate his rights against the employing agency directly); Trout v. Lehman, Civil Action No. 82-2507, slip op. at 3 (D.D.C. July 7, 1983) (holding that de novo Title VII action on merits is plaintiff's sole remedy for claim of unsatisfactory administrative investigation of claims accepted by agency; plaintiff did not raise issue of improper rejection of claims).

Accordingly, if plaintiff's factual allegations are true, plaintiff has a right to compel investigation of his discrimination claims with respect to the remaining fourteen jobs, and defendant has a nondiscretionary duty to do so under 29 C.F.R., section 1613.215[4/]

Defendant contends that even if HHS has improperly restricted the scope of its investigation, plaintiff has an

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4/ Under United States v. Caceres, 440 U.S. 741, 749 (1979), agency regulations promulgated under Title VII have the force of law and may be enforced by a federal court. It has been suggested that even though a violation of a substantive agency regulation (affirmative action guidelines) promulgated under Title VII need not be redressed as if it constituted a direct violation of Title VII's substantive provisions, another type of action to enforce the regulation may be appropriate. Page v. Bolger, 645 F.2d 227, 232 n.10 (4th Cir.), cert. denied, 454 U.S. 892 (1981) (cited by defendant and in Trout v. Lehman, supra).

adequate alternative remedy in that he can raise that issue before the EEOC and, if necessary, this Court, following entry of a final decision on all aspects of his complaint recognized by HHS. This contention is at odds with defendant's professed concern for avoiding piecemeal resolution of plaintiff's claims. See Defendant's Memorandum at 4. If plaintiff's 1979 complaint does in fact encompass discrimination claims as to eighteen Stride Program positions, it would be grossly inefficient to proceed with investigation of only a fraction of those claims instead of investigating all simultaneously.[5/] More fundamentally, one purpose of Title VII's provision for an administrative remedial scheme is to

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5/ When a plaintiff challenges the depth but not the scope of an agency investigation, this issue does not arise. Cf. Trout v. Lehman, supra.

facilitate conciliation. A precondition to meaningful conciliation is the agency's recognition of the full scope of the alleged discrimination. If the agency's view of the complaint--and corresponding limits on the investigation--are unduly narrow, plaintiff's remedy under Title VII is not adequate and mandamus may be appropriate.

In requesting mandamus relief to prohibit defendant from investigating on remand the entirety of the leave issue (as opposed to the limited matter of attorney's fees), plaintiff contends that the merits of the leave issue are already the subject of a final agency decision in plaintiff's favor which defendant is without discretion to disturb. The basis of this contention is the undisputed fact that the agency, by failing to act on plaintiff's complaint within thirty days after receipt of the

file and recommended disposition from the EEOC, was compelled to adopt verbatim the EEOC's recommendation, which included findings for plaintiff on the merits of the leave issue. See Complaint, Exh. 3; Memorandum of Understanding [between EEOC and defendant] filed December 27, 1984. Plaintiff overlooks the fact that the EEOC/HHS Memorandum of Understanding provides that in these circumstances, "the Agency will adopt EEOC"s recommended disposition as its proposed disposition of the complaint." Ordinarily, this provision would not impose a duty on defendant's part to stand by its proposal, and plaintiff could claim no right to have that proposal made final. However, plaintiff further alleges that defendant has "executed the remedial action" set forth in the proposed disposition. Complaint, para. 12. If this is so, plaintiff may be able to

construct an estoppel argument that would support issuance of a writ of mandamus prohibiting defendant from investigating on remand the entirety of the leave procedures issue. Accordingly, without commenting on the merits of such a claim, defendant's motion to dismiss this aspect of plaintiff's mandamus action will be denied.

To summarize, plaintiff's challenge to defendant's administrative processing of his employment discrimination complaint cannot be maintained under Title VII, and defendant's motion to dismiss is hereby granted to that extent. However, defendant's motion to dismiss plaintiff's mandamus action and request fro relief under the Declaratory Judgment Act (see n. 1, supra) is hereby denied. Whether a writ of mandamus will issue to prohibit defendant from investigating on remand the leave procedures issue (except

as it relates to attorney' fees) will depend on plaintiff's ability to develop a successful estoppel argument. Whether defendant may be compelled under a writ of mandamus to investigate plaintiff's discrimination claims as to each of eighteen Stride Program positions will depend on whether plaintiff's May, 1979 complaint encompassed those positions, which is, at least in part, a question of fact. Further discussion of these questions must await completion of limited discovery, as provided below:

1. Defendant shall file with the Court, no later than July 10, 1985, the entire record of administrative proceedings on plaintiff's 1979 agency complaint.

2. Defendant's responses to plaintiff's outstanding requests for admissions (filed October 19, 1984) shall be filed no later than July 10, 1985.

3. If necessary, the parties may take limited discovery carefully tailored to the issues identified above at page [17a], the period for such discovery ending August 1, 1985.

4. Within twenty days following the close of discovery, defendant may supplement its alternative motion for summary judgment, if desired, and plaintiff may file his own cross-motion for summary judgment, if desired. The parties' oppositions to those motions shall be due within ten days thereafter; replies shall follow within seven days thereafter.

SO ORDERED, this 25th day of June, 1985.

/S/
JOYCE HENS GREEN
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA
Civil Action No. 84-0385

GRANT ANTHONY,
Plaintiff,
v.
MARGARET M. HECKLER,
Defendant.

OPINION AND ORDER

In yet another chapter in this long-running saga, plaintiff Grant Anthony has filed a motion asking this court to reopen this case, to find defendant Otis R. Bowen, Secretary of Health and Human Services (HHS), in contempt of orders of this court and of the United States Court of Appeals for

the District of Columbia, and to sanction defendant for his alleged contempt. For the reasons articulated below, plaintiff's motion will be granted in part and denied in part.

I. Background

This history of this litigation is critical to the resolution of the instant motion and is therefore recounted here in some detail. Plaintiff Grant Anthony is a black male who, at all relevant times, has been employed as a patient care technician at HHS' National Institutes of Health (NIH). In early 1979, plaintiff alleged to an equal employment officer that he was being discriminated against on the basis of his sex and race, making general allegations as to lack of training programs, failure to promote, improper performance evaluations and unfair use of special leave procedures. While informal conciliation and

investigation was underway, Anthony filed a formal complaint of discrimination May 10, 1979. His complaint again alleged that educational programs were being denied to black workers and added a new claim -- that, when blacks were found to be "highly qualified" for NIH's Stride program (a career development program at theagency), those positions were cancelled. The Equal Employment Opportunity Commission (EEOC) investigated the complaint and issued a Recommended Disposition in August 1981 finding (1) that there was probable cause to believe that special leave procedures had been imposed upon Anthony because of racial animus and (2) that probable cause did not exist to support the finding that plaintiff had been discriminated against with respect to five of the eighteen Stride positions for which he had applied and been found to be highly qualified.

After the EEOC's decision was adopted by NIH, plaintiff requested a hearing and, in part because both parties agreed that the initial investigation had been inadequate, the complaint was remanded to the agency. NIH accepted the complaint on March 9, 1983 and initiated a supplemental investigation which (1) focused on only four of the eighteen Stride positions and (2) reopened the special leave issue.

With the supplemental investigation still pending, plaintiff filed this suit on Februry 6, 1984. Predicating jurisdiction under the general mandamus statute, see 28 U.S.C., section 1361, Anthony contended that NIH had improperly limited the scope of its supplemental investigation only to the Stride positions for which he was qualified (rather than all eighteen positions to

which he applied) and had illegally reopened the special leave issue. Ruling on the parties' cross-motions for summary judgment, this Court held in an Order issued on April 25, 1986 that, because Anthony had only raised the "highly qualified" issue -- but not his non-selection for all eighteen positions -- in his formal complaint, he could not rely on pre-complaint materials to broaden the investigation and that EEOC was not bound to investigate all eighteen positions for which plaintiff had applied. See Anthony v. Bowen, 674 F. Supp. 876, 878-80 (D.D.C. 1986). At the same time, however, defendant's arguments that it was entitled to reopen its investigation with respect to its use of special leave were rejected; summary judgment was entered in favor of plaintiff on that matter. Id. at 880.

Both parties appealed. In an

unpublished Memorandum Opinion issued on March 5, 1987, the Court of Appeals ruled that post-complaint evidence should have made clear that Anthony intended to challenge his nonselection for all eighteen Stride slots. It therefore remanded that portion of this case to this Court "with instructions to return it to the agency so that Anthony may promptly receive a complete administrative ruling on the full (eighteen opportunity) discrimination claims he attempted to present."[1/] After receiving the Court of Appeals' mandate on June 10, 1987, this Court issued an Order on June 12, 1987 dismissing this case and remanding it to defendant "for the purpose of providing the plaintif... a prompt and complete administrative

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1/ The Court of Appeals affirmed this Court's ruling on the special leave issue.

ruling on the eighteen opportunity discrimination claims he attempted to present before the agency."[2/]

During the time of this litigation in federal court, the supplemental administrative investigation continued within NIH. On November 13, 1986, a Proposed Disposition was issued finding that plaintiff had not been discriminated against with regard to the four Stride positions for which he was found highly

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2/ In a separate matter not at issue here, defendant also appealed from an Opinion and Order issued on July 29, 1988, granting plaintiff approximately $40,000 in attorney's fees under a provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000(e)-5(k). On June 7, 1988, the Court of Appeals vacated that award and remanded to this Court for a determination of Anthony's entitlement to fees under the Equal Access to Justice Act, 28 U.S.C., section 2412. See Anthony v. Bowen, 848 F.2d 1278 (D.C. Cir. 1988). Anthony has recently filed a petition for a writ of certiorari challenging the Court of Appeals' ruling on the attorney's fee question. See Exhibit to Plaintiff's Reply Brief.

qualified. Anthony promptly requested a hearing on that decision and, in light of the intervening ruling of the Court of Appeals (and this Court on remand), the EEOC hearing examiner remanded Anthony's complaint to NIH for further proceedings. On November 3, 1987, the agency accepted the allegations of plaintiff's complaint concerning the remaining fourteen Stride positions.

Matters stood this way until November 1, 1988, when Anthony filed the instant motion. As the basis for reopening this action and holding defendant in contempt, plaintiff pointed out that he had still not received a ruling from NIH on its third investigation of this complaint. Analogizing defendant's actions to a situation where a party had disregarded discovery orders, Anthony urged this Court to invoke Fed. R. Civ. P. 37(b) and sanction defendant

by deeming as established "for all purposes of this suit and any ancillary or parallel administrative proceedings" the fact that plaintiff had been discriminated against on the basis of race and sex when he was not selected for the fourteen Stride positions for which he applied but was not highly qualified.

Defendant opposed Anthony's motion on November 21, 1988. In its opposition, defendant argued that plaintiff's motion was moot because, on November 17, 1988 -- just four days earlier -- NIH had issued a Proposed Disposition rejecting Anthony's claims of discrimination with respect to all eighteen Stride positions. Defendant also argued that the delay in the issuance of its decision could not be compared with a failure to adhere to discovery orders under Rule 37 and that, if a finding of contempt was entered, the

Court should not reach the merits of Anthony's underlying Title VII complaint and refrain from deeming as established the factual matters raised by plaintiff.

II. Discussion.

The record adduced in this case demonstrates that defendant has violated this Court's June 12, 1987 Order. Although that Order remanded this case in order to provide Anthony "a prompt and complete administrative ruling" on all eighteen of the Stride positions, defendant has, to this date, done neither. The Proposed Disposition released by NIH on November 17, 1988, was certainly not issued in a timely fashion. The decision was rendered 17 months after this matter was remanded to the agency in June 1987, and more than 20 months after the Court of Appeals' decision in March

1987.[3] It followed only after Anthony brought the instant motion for contempt and for sanctions. And it was issued only after defendant had moved for and obtained an extension of time to file its opposition to the instant motion.[4] In view of the fact that EEOC regulations require that investigations be concluded within 180 days of the date on which they are filed, see 29 C.F.R., section 1613.220(a), and because defendant offers

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[3] In addition, after the case was remanded on June 12, 1987, Anthony's Complaint was not even accepted by the agency until November 3, 1987 -- almost five months later.

[4] The grounds stated in defendant's motion were (1) that counsel had been sick and unable to give the agency notice of the motion until November 7, 1988 and (2) that agency counsel was new to the case and needed time to "research the voluminous files and assist in responding to the asserted facts in the motion."

no plausible explanation for the delay,[5] the Court must conclude that its actions in response to the Order of June 12, 1987 were simply not "prompt."[6]

Nor has defendant provided Anthony with a "complete administrative ruling" on his claims. The Proposed Disposition of November 17, 1988, makes clear that NIH as still not conducted any investigation into the fourteen Stride slots for which plaintiff was not highly qualified. Rather, in explaining its

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5/ Defendant rather obliquely observes that, when the second investigative report was completed in September 1985, plaintiff's counsel was provided an opportunity to submit comments but never did so. Opposition at 2. That argument is simply irrelevant, for it fails to offer any reason why the third investigation and Proposed Disposition ordered in June 1987 were delayed for so long.

6/ Defendant does not claim nor could he that the delay was justified by the need to become familiar with a new set of facts or circumstances, because the agency has been aware of Anthony's claims since May 1979.

decision, the Proposed Disposition states that

> On November 15, 1988, the Department, i.e., the Assistant Director for Investigations, OHR, notified NIH that in its view, the two investigations which had already been conducted into the Complainant's allegations had developed sufficient information to permit NIH to issue a proposed disposition with respect to the allegations concerning the remaining 14 positions.

See Exhibit 1 to Defendant's Opposition at 4-5. Defendant's decision not to conduct an investigation of the remaining fourteen Stride positions is remarkable. It ignores the clear commands of the Court of Appeals (which stated that the agency's investigation "should have extended to all eighteen Stride positions," Memorandum Opinion at 4) and of this Court (which remanded with respect to "the eighteen opportunity

discrimination claims" that Anthony presented to it, June 12, 1987 Order) (emphasis added in both). It also defies common sense for, if the agency possessed adequate information to rule on all eighteen Stride positions at the end of its second investigation (which concluded on March 5, 1985), it could have presented that information either to this Court -- which did not render its decision on the merits until April 25, 1986 -- or to the Court of Appeals which issued its Memorandum Opinion on March 5, 1987. Finally, defendent's position fails to take into account the history of this litigation, in which plaintiff sued to compel NIH to "investigate the facts relevant to plaintiff's nonselection for each of the eighteen Stride Program positions for which plaintiff made application," Complaint at 5; this Court

ruled that defendant need only investigate four of those positions; and the Court of Appeals then held that this Court erred in upholding defendant's attempt to limit its investigation. In short, having been ordered to conduct an investigation, defendant has done nothing at all.[7/]

Having said that much, this Court will refrain from holding defendant in contempt at this time. The Supreme Court has stressed that "[t]he judicial contempt power is a potent weapon." International Longshoreman's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1969). Our own Court of Appeals has made clear that, "[i]n light of the

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7/ Defendant's argument that Anthony's motion is moot because it has provided him with a ruling on the eighteen Stride positions is therefore irrelevant, for no investigation -- let alone a prompt one -- has ever been conducted into all eighteen positions.

remedy's extraordinary nature, courts rightly impose it with caution." Joshi v. Professional Health Services, Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987) (per curiam), and it has noted that, "[w]hile 'courts have inherent power to enforce compliance with their lawful orders through civil contempt,' courts need not impose the contempt sanction for every violation." Marshall v. Local Union No. 639, 593 F.2d 127, 1303 (D.C. Cir. 1979) (quoting Shillitani v. United States, 384 U.S. 364, 370 (1965) (footnotes omitted). In light of these admonitions, and given the unique circumstances of this case, the Court will not adjudge defendant in contempt at

this moment.[8/]

On the other hand, defendant has not thus far complied with this Court's

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8/ Defendant attempts to justify its actions by arguing that the Orders of this Court of Appeals have been complied with because they only required prompt and complete "rulings," but not "investigations." Supplemental Memorandum at 3 n.2. It is clear from the entire history of this litigation, however, that Anthony sought a proper investigation of his claims from the agency. This Court recognized that fact when ruling on the attorney's fees issue. See Opinion and Order of July 29, 1987 at 2 ("Upon remand this Court dismissed this case with an order directing defendant to broaden the investigation to include the additional charges of discrimination plaintiff seeks to raise"). The Court of Appeals also recognized that fact in its opinion dealing with attorney's fees. See 848 F.2d at 1280 (this Court's "decision that the agency need not investigate his non-placement in the remaining STRIDE positions was reversed . . ."); id, n.2 ("There is no indication in the record as to the current status of the agency's investigation into Anthony's claims"). And, most importantly, the administrative law judge recognized that fact when remanding Anthony's complaint for a third investigation in September 1987. See Exhibit B to Reply Brief ("The U.S. Court of Appeals has ordered the investigation of fourteen STRIDE positions . . .").

remand Order of June 12, 1987. Accordingly, this case will be reopened and remanded once again in order that defendant conduct an investigation of the fourteen Stride positions for which Anthony was not highly qualified. As the EEOC's regulations require, the investigation shall be completed, and a Proposed Disposition issued, within 180 days of this date.[9/] If defendant fails to meet this schedule, the Court will then proceed to consider plaintiff's motion for contempt and for sanctions and will not hesitate to hold defendant in contempt of this Opinion and Order, as well as its Order of June 12, 1987. If appropriate, the Court will impose

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9/ As also required by the regulations, Anthony shall cooperate with defendant to assure that its investigation proceeds without delay. Defendant shall file with the Court a copy of its Proposed Disposition after it has been issued.

sanctions at that time.[10]

III. Conclusion

For these reasons, it is

ORDERED that plaintiff's motion to reopen be and it hereby is granted and this action is remanded to defendant for proceedings consistent with this Opinion and Order; and it is

FURTHER ORDERED that plaintiff's motion to hold defendant in contempt and for sanctions be and they hereby are held in abeyance for a period of 180 days.

December 27, 1988

/S/
JOYCE HENS GREEN
United States District Judge

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[10] The Court therefore does not, and need not, address the parties' dispute over the remedy suggested by Anthony in the instant motion.